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Supreme Court of the United States

DONALD J. TRUMP, *ET AL.*, *PETITIONERS*,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *ET AL.*, *RESPONDENTS*.

DONALD J. TRUMP, *ET AL.*, *PETITIONERS*,
v.
STATE OF HAWAII, *ET AL.*, *RESPONDENTS*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF IMMIGRATION EQUALITY, THE NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, THE NATIONAL QUEER ASIAN PACIFIC ISLANDER ALLIANCE, AND THE LGBT BAR ASSOCIATION OF LOS ANGELES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

This brief sets forth the legal and policy concerns of *Amici Curiae* Immigration Equality, The New York City Gay and Lesbian Anti-Violence Project, The National Queer Asian Pacific Islander Alliance, and The LGBT Bar Association of Los Angeles (collectively, "*Amici Curiae*") regarding Executive Order 13780 (Mar. 6, 2017) (the "EO").[1]

Amicus Curiae Immigration Equality is the nation's largest legal service provider for LGBTQ[2] and HIV-positive immigrants. Each year, the organization provides legal advice to nearly 3,000 individuals and families, actively manages more than 650 immigration cases, and appears in federal circuit courts as counsel or *amicus curiae*.

The New York City Gay and Lesbian Anti-Violence Project ("AVP") is a non-profit organization founded in 1980 that empowers LGBTQ and HIV-affected communities and allies to end all forms of violence through organizing, education, counseling, direct legal representation, and advocacy. AVP's legal services include immigration support for LGBTQ immigrants. AVP is also the convener for the National Coalition of Anti-Violence Programs,

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[1] No party to the appeal, nor counsel for any party to the appeal, authored any part of this brief. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this *amicus* brief.

[2] Lesbian, gay, bisexual, transgender and queer ("LGBTQ") individuals are sometimes also referred to herein as LGBT or LGBTI (lesbian, gay, bisexual, transgender, intersex).

which addresses the needs of LGBTQ communities, including LGBTQ immigration support.

The National Queer Asian Pacific Islander Alliance ("NQAPIA") is a federation of LGBTQ Asian American, South Asian, Southeast Asian, and Pacific Islander ("API") organizations. NQAPIA builds the capacity of local LGBTQ API groups, develops leadership, promotes visibility, educates the community, invigorates grassroots organizing, encourages collaboration, and challenges anti-LGBTQ bias and racism. NQAPIA has spearheaded an educational and advocacy campaign in support of immigrants' rights.

The LGBT Bar Association of Los Angeles is a bar association of gay, lesbian, bisexual and transgender lawyers, judges, law students and other legal professionals. The Association is dedicated to furthering justice and equality, and the advancement of gay, lesbian, bisexual and transgender rights throughout California and beyond.

Amici Curiae are deeply troubled by the impact that the EO would have on LGBTQ people in the United States and the six predominantly Muslim countries from which the EO would drastically restrict — if not effectively ban — immigration, as well as the import of the EO on refugees from around the world. The EO is bad policy made worse because it assaults established United States legal principles and constitutionally protected rights. *Amici Curiae* respectfully urge the Court to affirm the Fourth and Ninth Circuits' decisions in *International Refugee Assistance Project v. Trump*,

No. 17-1351 (4th Cir. May 25, 2017) and *Hawaii v. Trump*, No. 17-15589 (9th Cir. June 12, 2017), and to dissolve the stay of those decisions entered by this Court, thereby avoiding the significant, irreversible harms that the EO would inflict while the litigation proceeds below.

SUMMARY OF ARGUMENT

Individuals who identify as lesbian, gay, bisexual, transgender and queer live, in many countries around the world, in persistent, grave danger. As of October 2016, homosexual conduct was still outlawed in more than 70 countries worldwide, 13 of which made such conduct punishable by death.[3] Some regimes deny the very existence of LGBTQ people, making it impossible for LGBTQ individuals to seek government protection from the severe persecution and violence to which they are routinely subjected.[4]

Like other immigrants, LGBTQ persons who already have family or partners living in the United States are eligible to apply for visas based on this family status. The process is long and difficult in the best of circumstances and the difficulty is only compounded by the EO, not only for would-be immigrants but also for refugees desperately seeking freedom from persecution experienced because of their identities.

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[3] Aengus Carroll, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws*, International Lesbian, Gay, Bisexual, Trans and Intersex Association 36-37 (11th ed. 2016), http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf ("*World Survey*").

[4] Human Rights Watch, *We Are a Buried Generation* (Dec. 15, 2010), https://www.hrw.org/report/2010/12/15/we-are-buried-generation/discrimination-and-violence-against-sexual-minorities ("*Buried Generation*") (recounting statement of Iran's then-President Mahmoud Ahmadinejad in 2007 that "[i]n Iran we don't have homosexuals like you do in your country. This does not exist in our country.").

The EO, if enforced, would halt visa processing from Iran, Libya, Somalia, Sudan, Syria, and Yemen (the "six countries") for an indefinite period of time, at the discretion of the Executive Branch. For LGBTQ individuals, this shutdown is not simply a bureaucratic inconvenience, but potentially a matter of life and death. A family-based visa delayed by the EO is, in effect, a visa denied. Visa approvals grinding to a halt under the EO mean LGBTQ individuals must remain in hostile and unsafe conditions for longer (and perhaps indefinitely, given the terms of the EO), delaying reunification with their family members in safe communities. The danger is heightened because merely seeking visas from local consular officials, while citing a same-sex relationship as the basis for a waiver, reveals applicants' sexual orientations or gender identities to local communities and government officials.

LGBTQ individuals who seek admission into the United States as refugees based on persecution in their home countries are similarly endangered by the EO. The EO would halt the admission of *all* refugees to the United States, again, with the Administration retaining discretion to continue the ban indefinitely. Without this crucial path to safety, refugees are forced to languish in refugee camps that are often no safer for LGBTQ individuals than their countries of origin.

As organizations committed to serving and advocating on behalf of the LGBTQ community in the United States and abroad, *Amici Curiae* believe it is in the public interest to affirm the injunctions curtailing the EO and to honor the United States'

long-standing commitment to protecting families, upholding our constitutional values, and serving as a place of refuge for persecuted and displaced people from around the world. LGBTQ people will suffer greatly and irreparably if the EO is enforced.

FACTUAL BACKGROUND

I. MANY LGBTQ INDIVIDUALS FACE PERSECUTION AND HOSTILE SOCIAL ENVIRONMENTS IN THEIR COUNTRIES OF ORIGIN, ESPECIALLY IN THE SIX COUNTRIES TARGETED IN THE EO

While the United States recently has made strides in advancing LGBTQ rights, including the right to form an officially-recognized family, the situation in many countries around the globe remains exceedingly grim. Even in countries where LGBTQ status is not considered a crime, LGBTQ individuals are still unable to forge family relationships due to severely anti-LGBTQ legal regimes.[5]

To escape persecution, LGBTQ individuals often relocate to the United States to marry, to reunite with close family members, or to seek refuge. For those seeking family-based visas, documenting their LGBTQ status in their countries of origin leaves them exposed to persecution and violence, causing many visa-seekers to fear the consequences of providing documentation of their status for those visa applications.

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5 *World Survey, supra* n.3, 27.

Similarly, individuals applying through the United States Refugee Assistance Program ("USRAP") — a program designed "[t]o offer resettlement opportunities to persons overseas who are of special humanitarian concern"[6] — are severely disadvantaged by delays. Many refugees are moved to camps or similar establishments while they await adjudication of their refugee applications.

While violence and inhumane treatment are common in refugee camps, LGBTQ refugees face risks that other refugees do not. [7] LGBTQ individuals often "encounter rejection in refugee camps and institutionalized homophobia" in their host countries, even those that are considered to be "frontline host countries in the global refugee crisis."[8] LGBTQ individuals in refugee camps often face "marginalization and hostility," and "transgender people are particularly vulnerable to violence."[9] Thus, even after they flee their home

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[6] U.S. Citizenship and Immigration Services, *The U.S. Refugee Admissions Program* 2 (2011), https://www.uscis.gov/sites/default/files/USCIS/Resources/Resources%20for%20Congress/Congressional%20Reports/2011%20National%20Immigration%20%26%20Consular%20Conference%20Presentations/Refugee_Admissions_Program.pdf.

[7] Human Rights Watch, *Lebanon: Syrian Refugee's Account of Torture* (Dec. 21, 2016), https://www.hrw.org/news/2016/12/21/lebanon-syrian-refugees-account-torture.

[8] Human Rights First, *LGBT Refugees and President Trump's Refugee Ban Executive Order, Fact Sheet: March 2017* (Mar. 7, 2017), http://www.humanrightsfirst.org/sites/default/files/hrf-lgbt-refugees-trump-refugee-ban-eo-march-2017.pdf ("*LGBT Refugees Fact Sheet*").

[9] *Id.*

countries, many LGBTQ individuals continue to face "extreme risks and persecution" until they are permitted to resettle in the United States.[10]

The EO, as drafted, would significantly impair, if not block, many LGBTQ individuals' chances at family unification or resettlement as refugees, dramatically increasing the risk of harm to these applicants abroad. Each of the six countries targeted by the EO explicitly criminalizes homosexual conduct, some of them authorizing or even mandating the death penalty for such offenses.[11] And in all of these countries, LGBTQ individuals "face a climate of societal and institutionalized homophobia," many suffering persecution from multiple sources, including disapproving family members, government and police forces, and terrorist groups.[12] The treatment of LGBTQ people in the six countries covered by the EO — treatment to which the EO would indefinitely consign LGBTQ family members and refugees — is detailed below:

Iran. As the U.N. Human Rights Council has noted and condemned on multiple occasions, LGBTQ people in Iran consistently "face harassment,

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10 *Id.*

11 *World Survey*, *supra* n.3, 36-37.

12 *LGBT Refugees Fact Sheet*, *supra* n.8 ("Halting the refugee admissions program — or the resettlement of refugees from the targeted Muslim-majority countries — leaves vulnerable LGBT refugees awaiting resettlement to face violence, discrimination, and even death.").

persecution, cruel punishment, and are denied basic human rights." [13] Iran criminalizes same-sex relations between consenting adults, and even mandates the death penalty for the "passive" male engaged in "sodomy" and for fourth-time "lesbian" offenders. [14] Authorities conduct many of these executions in public.[15] Those who are not subject to the death penalty may nonetheless be punished by up to 100 lashes for engaging in same-sex relations.[16] Because LGBTQ individuals may face prosecution under Iranian law if they seek help from authorities, the law "creates a 'chilling effect' on the ability (and desire) of victims to report abuses against them, and renders them more vulnerable to harassment, abuse, blackmail, and extortion by private actors."[17]

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13 U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in the Islamic Republic of Iran* 20, U.N. Doc. A/HRC/22/56 (Feb. 28, 2013), http://www.ohchr.org/Documents/Countries/IR/A-HRC-22-56_en.pdf.

14 Mission for Establishment of Human Rights in Iran, *Islamic Penal Code of Iran*, Part 2, Article 111; Part 3, Article 131 5, 7, http://mehr.org/Islamic_Penal_Code_of_Iran.pdf ("*Iran Penal Code*").

15 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Iran* 3, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265496.

16 *Iran Penal Code*, *supra* n.14, Part 2, Articles 112, 113; Part 3, Article 129 5-7.

17 *Buried Generation*, *supra* n.4.

LGBTQ people in Iran also face pervasive harassment, abuse, and violence "at the hands of private actors, including members of their family and society at large," as well as "members of Iran's police, security, and intelligence forces in public spaces."[18] The Iranian Penal Code does not include hate crime laws or other criminal justice mechanisms to aid in the prosecution of bias-motivated crimes.[19] These conditions have caused numerous LGBTQ Iranians to apply for asylum in the United States, many citing the threat of execution and violence due to their sexual orientation.[20]

The EO has already impeded the resettlement of would-be immigrants and refugees fleeing persecution in Iran. One Iranian refugee was accepted for resettlement in the United States after

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18 *Id.*

19 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Iran* 43-44, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265496.

20 *See, e.g.*, Shahirah Majumdar, *Trump's Travel Ban Could Be a Death Sentence for Queer Muslim Refugees*, Vice (June 29, 2017), https://www.vice.com/en_us/article/padyjv/trumps-travel-ban-could-be-a-death-sentence-for-queer-muslim-refugees; CBC Radio, *'Everybody Has Forgotten LGBT Refugees': Trump's Travel Ban Dashes Iranian Couple's Hopes* (June 30, 2017), http://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.4167703/everybody-has-forgotten-lgbt-refugees-trump-s-travel-ban-dashes-iranian-couple-s-hopes-1.4167706.

receiving a death sentence because of his sexuality.[21] However, his resettlement interview was abruptly canceled after the first EO took effect, forcing him to live in fear and subjecting him to multiple assaults while awaiting further action by the United States.[22] Another gay Iranian refugee was scheduled to travel to the United States until the EO blocked his plans.[23] The EO has thus already exacerbated the latent threats to LGBTQ lives in Iran, indefinitely suspending peoples' prospects for resettlement and peace.

Libya. Libya's Penal Code criminalizes consensual same-sex sexual acts, which are punishable by up to five years in prison for both partners.[24] "In the Libyan society, to be gay [is] considered against Islam."[25] Indeed, in 2012, Libya's representative to the U.N. proclaimed in a U.N.

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21 Nina dos Santos, *US travel ban leaves LGBT refugees in limbo*, CNN (Mar. 7, 2017), http://www.cnn.com/2017/03/07/world/trump-ban-blocks-gay-iranian-refugee.

22 *Id.*

23 Human Rights First, *U.S. Leadership Forsaken: Six Months of the Trump Refugee Bans* 14, http://www.humanrightsfirst.org/sites/default/files/HRF-US-Leadership-Forsaken-FINAL.pdf.

24 Libya: Penal Code of 1953, as amended by Law 70 of October 2, 1973, Articles 407(4), 408(4).

25 U.N. Human Rights Council, *Summary Prepared by the Office of the United Nations High Commissioner for Human Rights* (February 23, 2015), http://www.ecoi.net/file_upload/1930_1453302677_g1503174.pdf.

Human Rights Council meeting that "gays threaten the continuation of the human race."[26]

Reflecting these social mores, official and societal persecution and violence against LGBTQ individuals in Libya are widespread, [27] and no legislation exists to protect LGBTQ individuals against such mistreatment.[28] In its 2016 report on human rights in Libya, the State Department noted several reports of physical violence, harassment, and blackmail based on sexual orientation and gender identity. "Militias often policed communities to enforce compliance with militia commanders' understanding of 'Islamic' behavior, and harassed and threatened with impunity individuals believed to have LGBTI orientations and their families."[29] For example, in 2013, reports emerged that 12 men, believed to be homosexual, were detained and threatened with execution by an armed group seeking to enforce a strict form of Islamic Sharia

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26 Canada: Immigr. and Refugee Bd. of Canada, *Libya: Situation of sexual minorities, including legislation; treatment by society and authorities; state protection and available services (2011-July 2014)*, July 17, 2014, http://www.refworld.org/docid/54ca12544.html ("*Libya: Situation of Sexual Minorities*").

27 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Libya* 28, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265510 ("*Libya's Human Rights Practices*").

28 *Libya: Situation of Sexual Minorities*, *supra* n.26.

29 *Libya's Human Rights Practices*, *supra* n.27, 28.

law. [30] Other individuals have reported being arrested and raped by Libyan police due to their sexual orientation.[31]

Somalia. Homosexual conduct is outlawed in Somalia. In northern Somalia, where the Somalian Penal Code governs, homosexual intercourse is punishable by imprisonment from three months to three years. [32] In southern Somalia, under the control of militants, consensual same-sex sexual acts are punished by flogging or by death.[33]

Somali society largely deems sexual orientation and gender identity to be taboo. [34] Thousands of LGBTQ individuals in Somalia keep their sexual orientation a "closely guarded secret," knowing that revealing that information could attract potential retribution from terrorist groups or

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30 United Kingdom: Foreign and Commonwealth Office, *Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report - Libya* 194 (Apr. 15, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408376/Cm_8593_Accessible_complete.pdf.

31 *Libya: Situation of Sexual Minorities*, *supra* n.26.

32 Somalia: Penal Code, Legislative Decree No.5/1962, Article 409.

33 Amnesty Int'l, *Making Love a Crime, Criminalization of Same-Sex Conduct in Sub-Saharan Africa* (June 24, 2013).

34 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Somalia* 38 (Mar. 3, 2017), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265300.

armed gangs.[35] As one source described it, "LGBT people in Somalia are silent and invisible, often facing violence and rejection from their families and communities that results in honour killings and suicides."[36]

Violence against LGBTQ people in Somalia is rampant. For example, the U.N. Human Rights Council reported a 2013 incident in which a gay Somali 18-year-old teen was blindfolded, buried up to his waist, and then stoned to death for allegations of homosexuality.[37] There have been reports of gangs of armed men searching the streets of Somalia for people suspected of being LGBTQ.[38]

Sudan. Sudan's Penal Code criminalizes "sodomy," with punishment ranging from 100 lashes to life imprisonment and even death.[39] Additionally,

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35 Catarina Stewart, *Young Somali activist sentenced to death for being a lesbian*, The Independent (Jan. 30, 2016), http://www.independent.co.uk/news/world/Africa/young-somali-activist-sentenced-to-death-for-being-a-lesbian-a6844216.html.

36 Swedish Int'l Government Cooperation Agency, *The Rights of LGBTI People in Somalia* 1 (Nov. 2014), http://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-somalia.pdf ("*LGBTI People in Somalia*").

37 U.N. Human Rights Council, *Universal Periodic Review second cycle, Summary of stakeholders' information* 3 (Jan. 22, 2016).

38 *LGBTI People in Somalia*, *supra* n.36, 1.

39 Eur. Country of Origin Info. Network, *Sudan Penal Code 1991*, Chapter 15, Section 148, https://www.ecoi.net/file_upload/1329_1202725629_sb106-sud-criminalact1991.pdf.

the Penal Code provides that anyone who engages in acts considered indecent or an affront to public morals will be punished by flogging not exceeding 40 times, a fine, or both.[40]

The criminalization of "sodomy" and "indecent" acts accompanies pervasive anti-LGBTQ sentiment in Sudanese society. Many LGBTQ individuals have expressed concern for their safety. Vigilantes frequently target suspected gay men and lesbians for violent abuse, and public demonstrations against homosexuality are commonplace.[41] The State Department has documented such abuse, including by reporting that an individual was detained, harassed, and beaten by authorities due to his suspected affiliation with LGBTQ-friendly groups.[42]

Syria. The Syrian Penal Code prohibits "carnal relations against the order of nature," and provides for at least three years' imprisonment for violations.[43] Though the law does not specifically address LGBTQ activity, police have used this

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40 *Id.* Section 151.

41 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Sudan* (Feb. 27, 2014), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265306.

42 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Sudan* (Mar. 3, 2017), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265306.

43 Syria: Penal Code of 1949, Articles 517, 520.

provision to persecute LGBTQ people.[44] Police also frequently target LGBTQ individuals by arresting them without basis on pretexts such as abusing social values; selling, buying, or consuming illegal drugs; and organizing and promoting "obscene" parties.[45]

The State Department has recognized "overt societal discrimination based on sexual orientation and gender identity in all aspects of [Syrian] society."[46] Throughout the past year, Syrian media reported numerous examples of government and police forces using accusations of homosexuality as a pretext to detain, arrest, and torture LGBTQ people.[47] It is difficult to determine how common this conduct is because police rarely report the basis for their arrests. Moreover, because of the social stigma surrounding LGBTQ identity, many survivors of such abuse are hesitant to come forward to report it.[48]

LGBTQ people in Syria also face extreme threats of violence at the hands of militant Islamist groups. For example, last year, one group's media

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44 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Syria* (Mar. 29, 2017), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265520.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

office issued a "photo report about the imposition of [] punishment" on those suspected of being gay. The photographs included images of a boy being pushed from the top of a building.[49] Human Rights Watch has documented similar violence, including a 15-year-old boy who was stoned to death after he was accused of being gay, and three men — one of whom was just 17 years old — accused of homosexuality who were "sentenced" to death by shooting. A witness to the shooting described the horrific scene: "When I approached the crowd, I saw the body of the boy shot twice . . . . A man standing there told me that he was shot . . . in front of all the people because he was gay."[50] According to the Syrian Observatory for Human Rights, at least 25 Syrian men were murdered in 2016 by extremist groups "on suspicion of homosexuality or for sodomy."[51]

Yemen. "Yemen is a conservative Arab state where homosexuality is seen as taboo and is condemned under the country's strong Islamic beliefs."[52] Yemen's Penal Code outlaws same-sex

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49 *Id.*

50 Amnesty Int'l, *Torture was my Punishment: Abductions, Torture and Summary Killings Under Armed Group Rule in Aleppo and Idleb, Syria* (July 2016), http://www.amnestyusa.org/sites/default/files/embargoed_5_july-_torture_was_my_punishment-final_version.pdf.

51 Human Rights Watch, *World Report 2017: Events of 2016*, https://hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

52 Int'l Refugee Rights Initiative, *Rights In Exile Programme, Yemen LGBTI Resources*, http://www.refugeelegal

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relations, with punishments ranging from 100 lashes to death by stoning.[53] Yemen's laws similarly do not protect against discrimination or hate crimes against LGBTQ individuals.[54] Quite the opposite. "[T]he most serious issue connected to the ban on homosexuality is that victims of hate crimes cannot seek help from the authorities."[55]

Because of the risk of criminal prosecution and severe punishment, as well as the societal condemnation they face, most LGBTQ individuals in Yemen are forced to live in hiding, and few LGBTQ people are open about their sexual orientation or gender identity.[56] As a result, "homosexuality in the

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aidinformation.org/yemen-lgbti-resources ("*Yemen LGBTI Resources*").

[53] Int'l Labour Org., *Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties*, Section 11, Article 264, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/83557/92354/F1549605860/YEM83557.pdf.

[54] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Yemen* 44 (2016), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265528.

[55] Ben Gladstone, *For Yemen's gay community social media is a savior*, The Irish Times (Aug. 22, 2015), http://www.irishtimes.com/news/world/middle-east/for-yemen-s-gay-community-social-media-is-a-saviour-1.2324447 ("*Yemen's Gay Community*").

[56] U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *2016 Country Reports on Human Rights Practices – Yemen* 44 (2016), http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2016&dlid=265528.

State is both 'unseen and unheard'. It is kept underground, hidden from authorities and a disapproving society."[57]

The plight of LGBTQ people in Yemen has been exacerbated by the ongoing civil war there.[58] Although "[t]he situation is very bad for people in general," the war "has a particularly severe effect on sexual minorities."[59] "Even in peacetime, however, homosexuality in Yemen has always been suppressed. Whatever the outcome of the civil war, the country's gay community has a tough battle ahead before any semblance of widespread acceptance can be achieved."[60]

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57 *Yemen LGBTI Resources*, *supra* n.52.

58 Collin Stewart, *Yemen's hidden gay community under siege*, Erasing 76 Crimes (Aug. 19, 2015), https://76crimes.com/2015/08/19/yemens-hidden-gay-community-under-seige.

59 *Id.*

60 *Yemen's Gay Community*, *supra* n.55.

ARGUMENT

I. THE UNIQUE HARDSHIPS IMPOSED ON LGBTQ POPULATIONS BY THE EO ARE CONTRARY TO U.S. LAW AND AGAINST THE PUBLIC INTEREST

A. Constitutional And Federal Law Emphasize The Importance Of Family Reunification And Marriage

The public interest in protecting family units, both LGBTQ and otherwise, is enshrined in constitutional law. As this Court has long recognized, the right to marry is fundamental. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[T]he right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." (citation omitted)). In *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), the Court made clear that these rights extend to LGBTQ people. 135 S. Ct. at 2604 ("The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

The right to marry regardless of sexual orientation inheres in all persons within the United States, not just U.S. citizens. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether

their presence here is lawful, unlawful, temporary, or permanent").

The United States' commitment to enabling families to live together is also embodied in its visa policies, which provide special allowances for family-sponsored visas. *See, e.g.*, 8 U.S.C. § 1153(a)(2) (allowing legal permanent residents to sponsor spouses, children, and unmarried sons or daughters); 8 U.S.C. § 1157(c)(2) (providing that spouses and children may be granted the same status as refugees whom they are accompanying or following to join); 8 U.S.C. § 1158(b)(3) (providing that spouses and children may be granted the same status as asylees whom they are accompanying or following to join).

Members of the LGBTQ community may normally avail themselves of family reunification visas to assist family members living abroad, including those suffering persecution in countries that discriminate against LGBTQ people. For example, LGBTQ individuals might apply for admission on a K-1 "fiancé(e)" visa, which requires the K-1 visa applicant's sponsor in the United States to petition the U.S. Citizenship and Immigration Services ("USCIS") to bring the applicant to the United States to be married.[61]

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61 *See* U.S. Dep't of State, Bureau of Consular Affairs, *Nonimmigrant Visa for a Fiancé(e) (K1)*, https://travel.state.gov/content/visas/en/immigrate/family/fiance-k-1.html (last visited Sept. 5, 2017); U.S. Citizenship and Immigration Services, *K-1 Process: Step by step*, https://www.uscis.gov/family/k-1-process-step-step (last visited Sept. 5, 2017). Once approved, the applicant must submit substantial documentation, including proof to substantiate the

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Immigration law must take family unity into account because "[p]ublic policy supports recognition and maintenance of a family unit." *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The Immigration and Nationality Act ('INA') was intended to keep families together. It should be construed in favor of family units and the acceptance of responsibility by family members."); *see also INS v. Errico*, 385 U.S. 214, 220 (1966) ("The intent of the Act is plainly to grant exceptions to the rigorous provisions of the 1952 Act for the purpose of keeping family units together. Congress felt that, in many circumstances, it was more important to unite families and preserve family ties than it was to enforce strictly the quota limitations or even the many restrictive sections that are designed to keep undesirable or harmful aliens out of the country.").[62]

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applicant's relationship with his or her fiancé(e) in the United States, to a U.S. Consulate or Embassy, participate in an in-person interview, and submit to a medical examination. *Id.*

62 Congress recognized in enacting and amending the INA that the immigration system is designed to preserve family units. *See* H.R. Rep. No. 85-1199, at 2 (1957) (the "legislative history of the [INA] clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united."); H.R. Rep. No. 1365, 82d Cong., 2d Sess., 29 (1952) (the INA implements "the underlying intention of our immigration laws regarding the preservation of the family unit"); *cf. Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) ("[T]he legislative history of the provision at issue here establishes that congressional concern was directed at 'the problem of keeping families of United States citizens and immigrants united.' To accommodate this goal, Congress has accorded a special 'preference status' to certain aliens who

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Moreover, the value of family unification is an important limitation on deportation proceedings, wherein the Government is required to consider "humanitarian or public interest considerations," including the "compelling humanitarian interest in keeping families united." *United States v. Raya-Vaca*, 771 F.3d 1195, 1207-08 (9th Cir. 2014) (citing cases); *see also Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987) (noting that "the preservation of family unity is recognized as a critical factor in admitting refugees to a country").

The United States has further recognized that the public interest includes consideration of LGBTQ families by its ratification of the International Covenant on Civil and Political Rights ("ICCPR") in 1992. 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).[63] Specifically, in ratifying the ICCPR, the United States recognized that its domestic law incorporates the fundamental precept that "the

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share relationships with citizens or permanent resident aliens.").

[63] Even if the ICCPR is not a self-executing treaty, the United States declared that "U.S. law generally complies with the Covenant[.]" S. Exec. Report 102-23 (102d Cong., 2d Sess.). Ratified treaties — even without implementing legislation — remain the supreme law of the land. *See* U.S. Const. art. VI, cl. 2. Thus, the ICCPR may be a "useful guide" to interpret domestic law. *See Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (a treaty that does not have force of law nonetheless serves as a "useful guide" in interpreting other provisions of law) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)); *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013) (same).

family is the natural and fundamental group unit of society and is entitled to protection by society and the State." ICCPR, art. 23, § 1. That principle obligates the United States to recognize the right of a family to live together, and to adopt appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons."[64]

Thus, the public has a strong interest in maintaining personal and familial relationships for persons within the United States and those seeking to immigrate to the United States.

B. "Familial Relations" Should Be Construed Broadly To Give Equal Dignity To LGBTQ Families

Family reunification and "familial relations" should cover *all* families — including embracing kinship arrangements that, due to discriminatory legal barriers, cultural factors, or circumstance, do not fit the traditional nuclear family model. A narrow conception of "family" that is limited to immediate legal or genetic family fails to account for the lived experiences of many LGBTQ families. Accordingly, a narrow construction would cause concrete harms for those families by excluding from admission to the United States extended family and others whose relationships are no less "close" or "bona fide" than nuclear family members.

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64 Human Rights Committee, *General Comment No. 18, para. 6*, U.N. Doc. HRI/GEN/1Rev.1, at 26 (1994).

For instance, same-sex marriage and step-parent or joint adoption of children by same-sex couples are not permitted in any of the six targeted countries.[65] As a result, LGBTQ families in these countries may be made up of permanent partners, parents, and children who are not legally recognized as belonging to the same family.[66] Moreover, many LGBTQ people, disowned by immediate family because of their sexual or gender identity, are raised by grandparents or other extended family, or form their own supportive networks with legally unrelated people.[67] Indeed, many LGBTQ people are forced to flee violence and oppression from their families of origin because of their sexual or gender identity. To the extent they have "traditional" family members in the United States, they may be unwilling or unable to draw upon those relationships.

The refugee experience itself fosters the creation of nontraditional families built on mutual

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65 *See World Survey*, *supra* n.3, 50-54 (surveying countries that recognize marriage and adoption by same-sex couples).

66 *See Obergefell*, 135 S. Ct. at 2595 (discussing the legal patchwork that precluded adopted children of LGBTQ families from claiming two legal parents).

67 For example, a 27-year-old lesbian left Iran in 2014 after receiving death threats because of her activities as the editor of an online magazine focusing on LGBTQ issues. She described the hardships faced by LGBTQ refugees, noting that "[a]t least with religious refugees, they have the support of their families, we don't even have that. Our families are [ashamed] of us." *See* Saeed Kamali Dehghan, *US travel ban leaves Iranian LGBT refugees in limbo*, The Guardian (Feb. 1, 2017), https://www.theguardian.com/world/2017/feb/01/us-travel-ban-leaves-iranian-lgbt-refugees-in-limbo.

affection and support rather than genetics or law. Refugee families, "more so than many others, are likely to be melded from the remnants of conventional families" as the "trauma of persecution and flights, the frequency of family separation, and the exigencies of life in exile create many families of choice and circumstance."[68]

In this country, too, economic necessity and changing cultural factors have made non-nuclear families increasingly common. As this Court noted seventeen years ago, "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). The number of people living in multi-generational or skipped-generation families in the United States has doubled in recent decades.[69] Likewise, many LGBTQ individuals in the United States rely on "families of choice" or alternative

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[68] Kate Jastram & Kathleen Newland, *Family unity and refugee protection*, Refugee Protection in International Law: UNHCR's Global Consultations on International Protection 583 (Erika Feller, et al. eds., 2003).

[69] *See* Richard Fry & Jeffrey S. Passel, *In Post-Recession Era, Young Adults Drive Continuing Rise in Multi-Generational Living*, Pew Research Center (July 17, 2014), http://www.pewsocialtrends.org/2014/07/17/in-post-recession-era-young-adults-drive-continuing-rise-in-multi-generational-living/ ("A record 57 million Americans . . . lived in multi-generational family households in 2012, double the number who lived in such households in 1980.").

family structures for the support that their biological families are unable or unwilling to provide.[70]

This Court has acknowledged that such non-traditional families are no less worthy of protection. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (association with extended family members is constitutionally protected); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987) (the Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life") (citations omitted). In the immigration context, the reason for this flexibility is simple: the "humane purpose of the [INA] to reunite families would be frustrated by an overly strict interpretation of who is considered a family member. *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980) (father was not required to prove his relationship with his child born out of wedlock under the strict laws of his home country, noting the "purpose of the Act . . . is to prevent continued separation of families").

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70 *See generally* Soon Kyu Choi & Ilan H. Meyer, *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications*, Los Angeles: The Williams Institute (Aug. 2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-A-Review.pdf.

As the District of Hawaii observed, "context matters."[71] Recognizing that families do not look the same everywhere, the UNHCR has advocated, with respect to family reunification, that "[e]conomic and emotional ties should be given the same weight in reunification as relationships based on blood ties or legally sanctioned unions." [72] International humanitarian law supplies a context-sensitive approach, "recogniz[ing] that a family consists of those who consider themselves and are considered by each other to be part of the family, and who wish to live together."[73]

LGBTQ persons come to the United States to achieve formal recognition and protection for their often unconventional families. A broad construction of "family" serves the public interest in family reunification and avoids perpetuating the policies that prevent LGBTQ people in the six targeted countries from realizing co-equal status in society.

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71 Order, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC, at 12 (D. Haw. July 13, 2017).

72 Jastram & Newland, *supra* n.68, 586 (citing UNHCR, *Background Note: Family Reunification in the Context of Resettlement and Integration*, Annual Tripartite Consultations on Resettlement, Geneva 20-21 (June 2001)).

73 *Id.* at 585-86 (citing *Commentary to the Additional Protocols* of the 1949 Geneva Conventions).

C. Federal Law Reflects The United States' Commitment To Accept LGBTQ Refugees

As a matter of both historic practice and commitment, the United States accepts and resettles refugees into the United States.[74] In fiscal year 2016, the United States accepted and resettled 84,994 refugees from around the world.[75] America's determination to accept and resettle refugees is a necessary concomitant of its worldwide leadership in guaranteeing and securing human rights for all.

When the United States ratified the Protocol on the Status of Refugees in 1968, *see* 19 U.S.T. 6223, T.I.A.S. No. 6577, and enacted the Refugee Act of 1980, it sought to conform domestic law to international obligations. Pub. L. No. 96-212, 94 Stat. 102; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("[O]ne of Congress' primary purposes [in enacting the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol . . . ."). Those

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[74] *See* U.S. Dep'ts of State, Homeland Sec., & Health & Human Servs., *Proposed Refugee Admissions for Fiscal Year 2016* ii (2015) ("On the occasion of World Refugee Day, June 20, President Obama re-affirmed our nation's commitment to helping refugees and our leading role in providing safe haven."), https://www.state.gov/documents/organization/247982.pdf; *see also* 8 C.F.R. § 207 (the maximum number of refugees who may be annually admitted to the United States is subject to modification by the President based on humanitarian concerns).

[75] *See* Dep't of State, Bureau of Population, Refugees, & Migration, *Summary of Refugee Admissions as of 31-March-2017*, http://www.wrapsnet.org/s/Refugee-Admissions-Report-2017_03_31.xls ("2016" worksheet) (last visited Sept. 5, 2017).

obligations include accepting LGBTQ refugees who are fleeing state-sanctioned persecution on account of their sexual or gender identities.

Establishing the United States' policy toward refugees, the Refugee Act expanded the legal definition of refugees to include those subject to "persecution on account of . . . membership in a particular social group." 8 U.S.C. § 1101(a)(42)(A). It is now well established that LGBTQ individuals are deemed to belong to such a "particular social group" entitled to refugee status because of their frequent persecution in other countries, as discussed above. *See Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) ("Sexual orientation can serve as the foundation for a claim of persecution, as it is the basis for inclusion in a particular social group."); *Maldonado v. Att'y Gen. of U.S.*, 188 F. App'x 101, 104 (3d Cir. 2006) ("homosexuality can be the basis for an asylum claim based on membership in a "particular social group"); *Moab v. Gonzales*, 500 F.3d 656, 662 (7th Cir. 2007) ("The Board of Immigration Appeals has recognized explicitly that homosexuality qualifies as a 'particular social group.'" (citing *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (B.I.A. 1990))); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) ("[A]ll alien homosexuals are members of a 'particular social group'" for asylum purposes). [76] Consequently, the United

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[76] *See also Pitcherskaia v. INS*, 118 F.3d 641, 646-47 (9th Cir. 1997) (remanding denial of an asylum application of a Russian lesbian who cited fear of conversion therapy); *accord Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1082 (9th Cir. 2015) (remanding a denial of relief and noting that "unique identities and vulnerabilities of transgender individuals must

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States has a well-developed policy in favor of accepting LGBTQ refugees, regardless of their country of origin.

II. THE EO CONTRAVENES U.S. LAW AND POLICY, WHICH ACCEPT LGBTQ INDIVIDUALS AS IMMIGRANTS AND REFUGEES

Many LGBTQ individuals apply for visas to permanently relocate to the United States, including the spouses, parents, children, and fiancés of U.S. citizens, residents, and asylees. LGBTQ individuals who cannot obtain family reunification visas may seek to enter the United States as refugees to avoid persecution in their countries of origin. The EO would foreclose both avenues.

The EO shuts down visa processing for 90 days for anyone seeking a visa from Iran, Libya, Somalia, Sudan, Syria, or Yemen. EO §§ 2(c), 3(a). After 90 days, the Government *may* reinstitute the visa application process, although the EO contemplates that the President may proclaim that certain categories of foreign nationals are permanently prohibited from entry. EO § 2(e). The EO allows for certain case-by-case exceptions to the ban on issuing visas, including "to visit or reside with a close family member" in the case of "undue hardship." EO § 3(c). The waiver provisions, as

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be considered in evaluating a transgender applicant's asylum, withholding of removal, or [Convention Against Torture] claim").

discussed below, provide no guarantee that LGBTQ individuals will be able to obtain visas under the EO.

The EO also suspends the USRAP for 120 days and lowers the refugee admissions cap to 50,000 refugees. The EO permits the Executive Branch to make exceptions to the ban on refugee admissions and allow refugees on a case-by-case basis where entry is in "the national interest."

A. The EO Prevents LGBTQ Individuals From Accessing The Mechanisms In Place For Family Reunification

The public policy goal of family reunification would be thwarted if the EO were to take effect by preventing U.S. citizens and residents from sponsoring U.S. visa applications of LGBTQ family members located in the six countries. The EO would deprive those U.S.-based family members of the fundamental right to family reunification, the very policy the INA was designed to accomplish. *See Solis-Espinoza*, 401 F.3d at 1094.

For example, the EO would impair residents and citizens whose fiancés or partners are located in the six countries from exercising the fundamental right to marry, as their partners would be prohibited from obtaining a K-1 "fiancé(e)" visa to visit the United States. *See* EO § 2(c). That harm is exacerbated for same-sex couples because those individuals cannot travel to one of the six countries to get married, as those countries do not recognize same-sex marriages. By the same token, U.S. children and family members of same-sex couples, unable to marry because they are stranded in one of

the six countries, would be uniquely deprived of the ability to form a legally recognized family, and are thus forced to bear "the stigma of knowing their families are somehow lesser" because their families receive unequal treatment under the EO. *See Obergefell*, 135 S. Ct. at 2600.

The EO is an extension of the same context-blind immigration policies that have disparately impacted LGBTQ immigrants and their families.[77] Although same-sex couples can take advantage of immigration benefits previously available only to opposite-sex couples, other avenues for family reunification remain closed or only available after surmounting additional hurdles. For instance, proving a parent-child relationship is significantly complicated, if not impossible, for a de facto parent who by the law of her country of origin cannot adopt or gain legal custody of her child, or marry the

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[77] As this Court and others have recognized, the federal government until only very recently categorically discriminated against LGBTQ people in the immigration context by, among other things, making homosexuality grounds for inadmissibility and by refusing to recognize same-sex spouses. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2596 (noting that gays and lesbians have been "excluded under immigration laws"); *Boutilier v. INS*, 387 U.S. 118 (1967) (determining that the INA's exclusion of aliens afflicted with "psychopathic personality" was intended by Congress to exclude homosexuals from admission); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014) ("The federal government categorically discriminated against gays and lesbians in immigration until 1990, barring all gay and lesbian noncitizens from entering the United States. . . . And the [INA] labeled gay and lesbian people as mentally ill." (citations omitted)).

child's biological parent.[78] And to the extent this Court recognizes in-laws, such as Respondent Dr. Elshikh's mother-in-law, as a "clear" example of close family, no same-sex couples in the six targeted countries have in-laws, unless they were married in a country that recognizes their relationships.[79]

Moreover, those U.S.-based family members would be forced to watch and wait as their LGBTQ loved ones are persecuted in the six countries. The EO indefinitely delays the ability of LGBTQ foreign nationals to leave the six countries, even though many of these individuals would have strong cases to obtain visas by virtue of their familial relationships with U.S. citizens or residents. If LGBTQ visa applicants in the six countries are forced to wait an indefinite period of time for the visa process to begin again, they will be waiting in hostile political and social environments. Each day the EO suspends the processing of visa applications, meritorious visa applicants will be exposed to the likelihood of violence — and the certainty of discrimination — in the six countries.

By refusing to accept visa applications from any individual in the six countries, many LGBTQ individuals may find themselves forced to seek

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[78] *See, e.g.*, 8 U.S.C. §§ 1101(b)(1), (c)(1) (defining "child" to include a genetic child, a stepchild by marriage, a child legitimated by law, or an adopted child in the adoptive parent's legal custody).

[79] These examples illustrate how the EO, even as modified by the injunctions under review, is too narrow to protect all close family relationships.

refugee status instead of the visa they otherwise might lawfully obtain. However, as discussed below, applying for refugee status presents unique challenges and perils to LGBTQ individuals, many of whom reasonably fear that "outing" themselves could put them or their loved ones in danger.

B. The EO Increases LGBTQ Refugees' Exposure To Dangerous Conditions

LGBTQ individuals are disparately affected by draconian immigration requirements because they are often unable to obtain the records necessary to demonstrate their abuse in the six countries to obtain refugee status.[80] Likewise, because consular staff in the six countries may include both U.S. citizens and foreign nationals, LGBTQ individuals often have well-founded fears of revealing their sexual orientation or gender identity in applying for refugee status. News of an LGBTQ person's sexual orientation or gender identity might be spread by personnel working in consulates in the six countries, provoking violence and discrimination towards such individuals.

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[80] *See* U.S. Citizenship & Immigr. Servs., *RAIO Directorate – Officer Training, Guidance for Adjudicating LGBTI Refugee & Asylum Claims* 38-46 (2011), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf ("reliable information regarding the treatment of LGBTI individuals may sometimes be difficult to obtain and that the absence of such information should not lead [an officer] to presume that LGBTI individuals are not at risk of mistreatment").

Suspending USRAP and lowering the annual refugee resettlement cap thus prolong the already lengthy and arduous process for LGBTQ individuals escaping persecution and seeking to reunite with their families. Indeed, the broad sweep of the EO disrupts a lifeline for *all* LGBTQ refugees fleeing persecution on the basis of their sexual or gender identity. Notwithstanding the already comprehensive security measures in place, applicants for admission to the United States will be forced to wait several more months while the Administration determines "whether, and if so what, additional information will be needed" to determine that individuals seeking admission to the United States do not pose a security or public-safety threat. EO § 2(a). The EO does not state how current procedures are deficient, nor even whether they are deficient, nor does it provide any assurance that refugee programs will resume after the 120-day suspension.

Moreover, the 120-day suspension snowballs into substantially longer delays as refugees' security and medical screenings expire and must be conducted again and again. These delays impact HIV-positive refugees in particular, many of whom are LGBTQ, who must undergo tuberculosis testing as part of the medical screening process.

During this indefinite delay, LGBTQ people will continue to be exposed to the ever-present risks to their safety in resettlement camps and other manifestly hostile environments. As described above, the immigration process for LGBTQ people in the six countries is uniquely fraught with danger, and the risks they face are aggravated every additional day

that they have to remain in conditions where public exposure of their sexual orientation or gender identity could lead to harm and possibly death.

Many LGBTQ refugees outside the six countries face similar hardships. Human Rights First reports that LGBTQ refugees fleeing persecution in Uganda have been stranded in Kenya as a result of the EO. Subject to harassment and violence in Kenya because of their sexuality and lacking access to necessary medical care, these refugees face grave danger while their refugee applications are held up by the EO.[81]

Even refugees who had been accepted for resettlement in the United States, but whose travel was not planned to occur prior to June 29, 2017, are excluded from admission under the Government's implementation of the EO.[82] For example, a gay Iraqi refugee was approved for resettlement to the United States in January after having been raped and beaten to the point of hospitalization in his home country. Even though he currently resides in Turkey, his resettlement was put on hold as a result of the EO, forcing him to endure continued persecution for his sexuality. Similarly, after fleeing her home country of Iraq, a 20-year-old transgender

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81 *U.S. Leadership Forsaken, supra* n.23, 14-15.

82 *See* U.S. Dep't of Homeland Sec., Office of Public Affairs, *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States* (July 21, 2017) ("*DHS FAQs*"), https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states.

refugee continues to receive death threats in her host country of Lebanon. After completing her U.S. resettlement interviews, her case was put on hold and travel plans delayed, placing her, like many others, in a state of constant vulnerability awaiting resettlement.

The EO also affects asylum-seekers who are already present in the United States. An immigration attorney representing a gay man from Syria in asylum proceedings described how USCIS told him that his client's application was on hold due to his country of origin and the EO, even though the client already resides in the United States. Meanwhile, the same attorney has said that his non-LGBTQ clients have not faced the same delays. These wide-ranging and chaotic consequences have upended the status quo with no logical relation to the stated goals of the EO. For every day the EO adds uncertainty and disrupts established expectations, the EO increases the dangers to LGBTQ lives.

III. THE EO'S WAIVER PROVISIONS DO NOT LESSEN THE IMPACT OF THE EO ON LGBTQ INDIVIDUALS

The EO's waiver provisions for visa-seekers and refugees do little to mitigate the harms LGBTQ individuals would face if the EO were allowed to go into effect. The EO suggests that waivers of its bar on travel by nationals of the six countries might be available "on a case-by-case" basis in cases of "undue hardship" and where the foreign national's entry into the United States "would not pose a threat to national security and would be in the national interest." EO §§ 3(c), 6(c). Whether to grant a

waiver, however, is entirely discretionary and dependent upon an Administration that has demonstrated an intent to interpret the EO as narrowly as possible and on individual consular officers located in the six countries. *Id.*

It is difficult to believe that the Government will issue a significant number of waivers in light of the Administration's reaction to the Supreme Court's order that the EO may only restrict entry by individuals "who lack any bona fide relationship with a person or entity in the United States." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. ___, 137 S. Ct. 2080, 2087 (2017). Initial guidance after this order limited "bona fide relationships" to only a handful of close familial connections and notably excluded fiancés.[83] Additional categories of relationships were only added after public pressure and additional litigation.[84] Should this Court ultimately uphold the EO as written, the Administration will likely revert to its original plan of excluding all individuals from the six countries and other refugees regardless of their connection to the United States.

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[83] *See* Defendants' Opposition to Emergency Motion to Clarify Scope of Preliminary Injunction, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC, at 2 (D. Haw. July 3, 2017) (admitting that initial guidance did not include fiancés in the definition of "close familial relationship").

[84] *Id.* (acknowledging that the Government revised its definition of close familial relationships to include fiancés after the *Hawaii* plaintiffs challenged the Government's exclusion).

Waivers are unlikely to offer real protection. Neither the EO itself nor the Administration has provided visa-seekers with meaningful guidance on the criteria that will be used in considering waiver applications. The EO vaguely suggests that "[c]ase-by-case waivers could be appropriate" in certain circumstances, including an applicant having "previously established significant contacts with the United States," "significant business or professional obligations," or "if the foreign national is . . . someone whose entry is otherwise justified by the special circumstances of the case." EO § 3(c). This vague language is insufficient, and could be easily abused. Nor does the EO define what conditions are "in the national interest" or what would constitute "undue hardship" under section 3(c), creating further uncertainty as to whether LGBTQ persons would be able to avail themselves of the waiver provisions.

The Departments of State and Homeland Security have done little to elaborate on the waiver requirements. Instead, the Department of Homeland Security broadly instructs that refugees can only claim a "close familial relationship" to a person in the United States to obtain a waiver if the would-be refugee presents "sufficient documentation or other verifiable information supporting that claim."[85] Likewise, the State Department advises visa applicants that "consular officers may seek additional information, as warranted, to ensure underlying relationships are bona fide, rather than

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85 *DHS FAQs, supra* n.82.

being established for the purpose of unlawfully obtaining a visa, including by evading the E.O."[86]

However, as discussed above, many LGBTQ individuals in the six affected countries lack documentation or other evidence that could demonstrate their familial relationships due to their unequal status under the laws of their countries of origin.[87] Thus, in contrast with similarly situated non-LGBTQ persons whose relationships are officially recognized by the six countries, LGBTQ persons stand to be disproportionately excluded from obtaining waivers due to the vagaries of the EO's waiver provisions and implementing guidance.

Moreover, even assuming an LGBTQ individual might qualify for a waiver, LGBTQ individuals would likely be deterred from applying for one. To qualify for many of the exceptions, an LGBTQ person would be required to reveal information about their sexual orientation or gender identity to consular officers, and possibly the consulate's staff of foreign nationals, posing additional dangers beyond those typically faced by

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[86] U.S. Dep't of State, *Important Announcement* (July 14, 2017), https://travel.state.gov/content/travel/en/news/important-announcement.html.

[87] Neither the EO nor the Administration's guidance explains whether the waivers would apply to LGBTQ persons seeking admission to the United States on account of their romantic or familial relationships. *See* U.S. Dep't of Homeland Sec., Office of Public Affairs, *Q&A: Protecting the Nation From Foreign Terrorist Entry to the United States* (Mar. 6, 2017), https://www.dhs.gov/news/2017/03/06/qa-protecting-nation-foreign-terrorist-entry-united-states.

LGBTQ persons seeking to travel to the United States. The resulting chilling effect on LGBTQ persons' desire to apply for admission to the United States would only compound their suffering in the six countries. The waiver provisions therefore do not diminish any of the special risks and dangers imposed by the EO on LGBTQ persons from the six countries seeking either a visa or applying for refugee admission.

CONCLUSION

For all the reasons stated above, *Amici Curiae* respectfully request that the Supreme Court affirm the orders of the Courts of Appeal for the Fourth and Ninth Circuits, enjoining the Government from enforcing the EO.

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